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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

UNITED STATES EX REL. DALE H. SNYDER,
Petitioner,

v.

H. TURLEY, WARDEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the order entered by the United States Court of Appeals for the Third Circuit on April 4, 1967, dismissing as moot petitioner's appeal from the order of the United States District Court for the Eastern District of Pennsylvania denying his Petition for a Writ of Habeas Corpus.

CITATION TO OPINION BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania has not been reported. A copy of this opinion is printed in the Appendix to this petition (A2). The United States Court of Appeals for the Third Circuit dismissed petitioner's appeal without opinion.

JURISDICTION.

The order of the United States Court of Appeals for the Third Circuit was entered on March 9, 1967 (A7). A timely petition for reconsideration was denied on April 4, 1967 (A8). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. After a court orders an applicant for a writ of habeas corpus released on bail pending the hearing on his petition, and the bail is thereafter entered by the applicant, do the issues raised in the petition then become moot since the petitioner is not "in custody"?

2. After a defendant's arrest pursuant to a complaint and a warrant of arrest issued thereon, is his right to the preliminary hearing granted by Rule 5 of the Federal Rules of Criminal Procedure extinguished when a grand jury indictment intervenes between the time of the preliminary hearing and a continuation thereof?

3. Should the United States Supreme Court exercise its supervisory power over the administration of criminal justice to condemn the expressly deliberate defiance by the Government of the orders of the United States Commissioner?

STATUTORY PROVISIONS AND RULES INVOLVED.

The Federal Habeas Corpus Act provides in pertinent part:

"§ 2241. Power to Grant Writ.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States. . . ." 62 Stat. 964, 28 U. S. C. § 2241.

Fed. Rules Cr. Proc. rule 5, 18 U. S. C. A., provides in pertinent part as follows:

"Rule 5. Proceedings Before the Commissioner.

(a) Appearance Before the Commissioner. An officer making an arrest under a warrant issued upon a complaint . . . shall take the arrested person without unnecessary delay before the nearest available commissioner. . . .

(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him."

Fed. Rules Cr. Proc. rule 9, 18 U. S. C. A., provides in pertinent part as follows:

> **"Rule 9. Warrant or Summons Upon Indictment or Information.**
>
> **(a) Issuance.** Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in . . . the indictment."

STATEMENT OF THE CASE.

Acting pursuant to the sworn complaint of a special agent of the Federal Bureau of Investigation, a United States Commissioner for the Eastern District of Pennsylvania issued a warrant of arrest commanding the apprehension of the petitioner, Dale H. Snyder, on a charge of bank robbery. Snyder was arrested on June 7, 1966 and, as the warrant of arrest directed, was brought forthwith before the Commissioner for a preliminary hearing.

At the preliminary hearing, an agent of the Federal Bureau of Investigation, who had no personal knowledge of the alleged bank robbery or of Snyder's alleged participation therein, offered hearsay testimony on behalf of the Government that a bank employee could identify Snyder as the culprit. Since the identifying witness referred to by the Federal Bureau of Investigation agent in his testimony was not produced by the Government to identify Snyder, the Commissioner ordered the United States Attorney to produce the said witness at a continued hearing to be held on June 14, 1966 at 2:30 P. M.

Snyder appeared with counsel at the continued preliminary hearing on the 14th, having remained in custody in lieu of $25,000.00 bail. Immediately before the hearing was to commence, the United States Attorney advised the Commissioner that his order for a further hearing and for the production of the identifying witness would not be honored by the Government, since the Government had taken it upon itself to present its case to the grand jury, which had returned a true bill of indictment against Snyder at 2:00 P. M., thirty minutes before his scheduled preliminary hearing. No further proceedings were ever held before the Commissioner.

The next day, June 15, 1966, Snyder, still incarcerated pursuant to the Commissioner's warrant of arrest, filed a Petition for a Writ of Habeas Corpus under 28 U. S. C., Section 2241 in the United States District Court for the

Eastern District of Pennsylvania, alleging that he was being illegally detained due to, *inter alia,* the denial to him of the preliminary hearing granted by the Federal Rules of Criminal Procedure.

On the same day, Federal District Judge A. Leon Higginbotham, Jr. entered an Order setting a date upon which the respondent—warden was to show cause why the Writ of Habeas Corpus prayed for should not be granted. Judge Higginbotham further ordered:

> "Pending the determination of the questions raised by the Petition and Writ the relator is to be produced by the Warden before the Clerk and is to be released upon the entry of bail in the sum of $25,000.00 to insure his appearance at the hearing of the Writ."

Under the authority of the aforesaid Order, Snyder posted the required bail and was then released from prison.

Besides showing the chronology of events referred to above, it was established at the hearing before Judge Higginbotham on the Petition for a Writ of Habeas Corpus that the day before the scheduled continued preliminary hearing the identifying witness in question was advised by the United States Attorney, through the Federal Bureau of Investigation agent who testified at the initial preliminary hearing, that she need not appear at the next day's hearing; that it was the decision of the United States Attorney who represented the Government at the first preliminary hearing that "Mr. Furia [the Commissioner] can order the United States Attorney from now until Kingdom Come and it has no practical meaning at all"; and that shortly after the Commissioner issued his orders for a further hearing and for production of the identifying witness, the First Assistant United States Attorney decided that instead of obeying those orders, an indictment should be returned in the case.

On January 12, 1967, Judge Higginbotham entered an Order denying the Petition for a Writ of Habeas Corpus

(A1) holding, in an Opinion filed December 30, 1966, that the indictment intervening between the preliminary hearing and the continued preliminary hearing superseded the Commissioner's warrant and obviated the necessity for the preliminary hearing (A6). From the Order denying his Petition, Snyder appealed to the United States Court of Appeals for the Third Circuit. Pursuant to the Government's motion to dismiss the appeal on the ground on mootness since Snyder was then free on bail, the Court of Appeals dismissed the appeal as moot on March 9, 1967 (A7) and denied Snyder's motion for reconsideration on April 4, 1967 (A8).

REASONS FOR GRANTING THE WRIT.

A. Question Presented No. 1.

1. The Third Circuit Court of Appeals' order dismissing Snyder's appeal as moot is philosophically in conflict with this Honorable Court's interpretation of the meaning of "in custody", the prerequisite to federal habeas corpus jurisdiction under 62 Stat. 964, 22 U. S. C. § 2241, as stated unanimously in *Jones v. Cunningham,* 371 U. S. 236 (1963). Holding that a person on parole meets the "in custody" requirement, this Court observed that actual, physical custody is not required, it only being necessary that the habeas corpus applicant's movements be restrained to an extent not shared by the public generally. The old English test of whether the applicant was at liberty to go where he pleased was approved, the Court noting:

> "History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones, supra* at 240.

It is submitted that an applicant for a writ of habeas corpus who is enlarged on bail pending a hearing has on him "restraints not shared by the public generally" and he would thus come within the philosophy of the *Jones* case. As to the nature of the restraint on a person on bail, this Court had the following to say:

> "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be

> done at once, they may imprison him until it can be done. . . . They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner." *Taylor v. Taintor*, 83 U. S. (16 Wall.) 371 (1872).

2. The decisions of this Honorable Court discussing whether a habeas corpus applicant under bail is "in custody" are in conflict. At least, the early cases conflict with the more recent view of "custody" expressed in *Jones, supra.*

We start with Mr. Justice Nelson's observation in *In re Kaine*, 55 U. S. (14 How.) 103, 133-134 (1852):

> "Pending the . . . hearing, the prisoner . . . is detained, not on the original warrant, but under the authority of the writ of *habeas corpus.* He may be bailed on the return *de die in diem*, or be remanded to the same jail whence he came . . . till the court . . . determines whether it is proper to discharge or remand him absolutely. . . . [T]he efficacy of the original commitment is superseded by this writ while the proceedings under it are pending, and the safe keeping of the prisoner is entirely under the authority and direction of the court issuing it. . . ."[1]

The authority of *Kaine* was followed in *Barth v. Clise*, 79 U. S. (12 Wall.) 400, 402 (1870), which held that no action could be maintained against a sheriff who permitted a prisoner to escape during a habeas corpus hearing, because once the sheriff produced the prisoner before the court, the prisoner was entirely under the control and direction of the

1. It is interesting to note that the language used by Judge Higginbotham in his Order setting bail "pending the determination of the questions raised by the Petition and Writ", *supra*, p. 6, is strikingly similar to Justice Nelson's language in *Kaine*.

court, to be bailed in the meantime or committed to a suitable prison. Contrary to the above decisions, the next opinions of this Court to deal with the issue raised by the instant Petition were *Johnson v. Hoy*, 227 U. S. 245 (1913), and *Stallings v. Splain*, 253 U. S. 339 (1919), both of which held that a petitioner on bail is not entitled to habeas corpus.[2] Finally, we come down to views expressed in *Jones v. Cunningham*, discussed above.

The order of the Court of Appeals for the Third Circuit dismissing petitioner's appeal as moot because he was free on bail pursuant to the order of the district judge effectively withdraws a habeas corpus judge's inherent discretion to deal with a prisoner as he sees fit after the respondent named on the Writ has complied with its command to produce the body of his prisoner. The instant case presents a clear record upon which this Court can now lay to rest the confusion, inherent in its own decisions, as to whether a person "free" on bail is "in custody" for purposes of federal habeas corpus jurisdiction.

3. A direct conflict exists between the Seventh Circuit and the Eighth and Ninth, and now, the Third, Circuits on the issue whether a person admitted to bail is "in custody". Thus, in *MacKenzie v. Barrett*, 141 Fed. 964, 966 (7th Cir. 1905), *cert. denied*, 203 U. S. 588 (1906), the Seventh Circuit held:

> ". . . [U]nder the rulings of the Supreme Court, one under arrest, but at large on bail, is entitled to a writ the same as if the arrest was accompanied by actual imprisonment",

---

2. Even though the *Stallings* Court held that admission to bail precluded habeas corpus, it observed, with reference to restraint of one under bail:

> "When Splain . . . brought Stallings before the court, he passed from the custody of the marshal into that of the court and he remained under its protection and *control* although enlarged on bail." *Stallings, supra* at 342. (Emphasis added.)

whereas the Ninth Circuit held in *Unverzagt v. United States,* 5 F. 2d 494, 495 (9th Cir. 1925), *cert. denied,* 269 U. S. 566 (1925):

> "The execution and acceptance of the bond precluded the appellant's right to habeas corpus. He was no longer restrained of his liberty",

and the Eighth Circuit, in affirming the lower court's denial of habeas corpus in *Rowland v. Arkansas,* 179 F. 2d 709-710 (8th Cir. 1950), *cert. denied,* 339 U. S. 952 (1950), stated:

> "The appellant was 'out on bond', free of any actual restraint and not in custody of any person . . . and the court after full hearing .... declared its conclusion that the writ was not available to a person so situated."

The Seventh Circuit's opinion in *MacKenzie* has been cited, questioned, and expressly not followed (as recently as 1964) in *Matysek v. United States,* 339 F. 2d 389, 393 (9th Cir. 1964), *cert. denied,* 381 U. S. 917 (1965), and in *Rowland v. Arkansas, supra.* However, *MacKenzie* has not been overruled by the Seventh Circuit to this date.

Surprisingly, the Third Circuit, by its order of dismissal in the case at bar, failed to recognize its own opinion in *Johnston v. Marsh,* 227 F. 2d 528 (3rd Cir. 1955), wherein the warden of the state penitentiary sought a writ of prohibition against Federal District Judge Marsh, who had admitted a habeas corpus applicant to bail pending decision on the merits on his petition. The court held:

> "This authority [the court's inherent power to grant bail] was exercised in habeas corpus cases *pending decision on the merits* (citing *In re Kaine, supra* and *Barth v. Clise, supra*). *Johnston, supra* at 531. (Emphasis added.)

B. Question Presented No. 2.

1. The decision of the United States District Court for the Eastern District of Pennsylvania, which was permitted to remain standing by the order of the United States Court of Appeals for the Third Circuit dismissing petitioner's appeal, specifically followed the decision of the Second Circuit Court of Appeals in *United States v. Heap,* 345 F. 2d 170 (2nd Cir. 1965) (A6). The *Heap* case is in direct conflict with the recent decisions of the United States Court of Appeals for the District of Columbia in *Blue v. United States,* 342 F. 2d 894 (D. C. Cir. 1964), *cert. denied,* 380 U. S. 944 (1965), and *Ross v. Sirica,* No. 20, 535, D. C. Cir., January 23, 1967.

In *Heap, supra,* the defendant was held for a preliminary hearing originally scheduled for February 6, 1964, but later adjourned to February 11, 1964. On February 7, 1964, a grand jury indicted the defendant. To Heap's argument that he was illegally deprived of a preliminary hearing, the Court answered:

> "This procedure was proper, as the function of the preliminary hearing is to establish probable cause for the detention of the defendant, and the indictment by the grand jury determined that issue." *Heap, supra* at 171."

In conflict with *Heap,* the District of Columbia Circuit, in *Blue v. United States, supra,* countered the Government's contention that the inadequacies of the proceedings at the preliminary hearing before the United States Commissioner were cured by the subsequent return of an indictment, as follows:

> "We, therefore, conclude that relief in such a situation is not to be foreclosed solely by reason of an intervening indictment." *Blue, supra* at 900.

In rejecting the Government's contention that the return of an indictment rendered any defect in the prelim-

inary hearing procedure moot, the Court, in *Ross v. Sirica, supra,* held:

> ". . . [A]n accused who demands the preliminary hearing as is his right is entitled to such a hearing and . . . , if the point is properly and timely pressed, a denial of that hearing cannot be excused by pointing to an intervening grand jury indictment."

2. It has been held by various Courts of Appeals that a defendant is not entitled to a preliminary hearing once he has been indicted by the grand jury. Thus, we find language of the Fourth Circuit that:

> "The only purpose of a preliminary hearing is to determine whether there is sufficient evidence against an accused to warrant his being held for action by a grand jury; and, after a bill of indictment has been found, there is no occasion for such hearing." *Barber v. United States,* 142 F. 2d 805, 807 (4th Cir. 1944), *cert. denied,* 322 U. S. 741 (1944),

and of the Third Circuit that:

> "It is settled that an accused may be indicted without prior arrest or commitment by a commissioner. The relator's contention that he was denied a hearing before a commissioner is, therefore, wholly without merit." *United States ex rel. Bogish v. Tees,* 211 F. 2d 69, 72 (3rd Cir. 1954).

Petitioner's argument below, and before this Court, is the distinction to be made between Federal Rules of Criminal Procedure 4 and 5, providing for a *mandatory preliminary hearing* before a commissioner after an arrest subsequent and pursuant to a *complaint,* and Rule 9 (entitled Warrant or Summons Upon Indictment or Information) which does not require a preliminary hearing after an arrest made subsequent and pursuant to an *indictment.*

This distinction has not been clearly recognized in the opinions of the various Courts of Appeals, has not been considered by this Court, and only seems to have been clearly delineated in the District of Columbia Circuit's opinion in *Crump v. Anderson*, 352 F. 2d 649, 656 (D. C. Cir. 1965), wherein it is stated:

> "Not necessary for the discussion of the scope of Rule 5 proceedings in *Blue* . . . , is the fact that Rule 9 proceedings depend upon a totally distinguishable predicate. An accused arrested on a bench warrant after indictment is accorded no right whatever to a preliminary hearing",

and

> "The dichotomy of treatment of 'probable cause' in Rule 5 situations and in those arising under Rule 9 is historic, lawful and thoroughly established both by rule and precedent."

Petitioner urges this Court to grant a writ of certiorari to make clear the rights granted defendants by Federal Rule of Criminal Procedure 5 and to prevent frustration of those rights by indictment during a continuance of the preliminary hearing.

C. Question Presented No. 3.

1. The underhanded conduct exhibited by the United States Government, through its United States Attorney, in this case, cries out for the intervention of this Court's supervisory powers over the administration of criminal justice. The admitted defiance of the orders of the United States Commissioner and the court sanctioned departure from the procedure required by the Federal Rules of Criminal Procedure should not be permitted to enjoy a stamp of approval to encourage similar conduct by United States Attorneys in other districts.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS LIPSCHITZ,
PAUL M. CHALFIN,
JEROLD G. KLEVIT,
Attorneys for Petitioner.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MISC. No. 3305.

Filed Jan. 13, 1967.

UNITED STATES OF AMERICA ex rel.
DALE H. SNYDER

v.

H. TURLEY, Warden.

ORDER.

AND Now, this 12th day of January, 1967, in accordance with the Memorandum filed in the above matter on December 30, 1966, it is

ORDERED that relator's Petition for a Writ of Habeas Corpus be and the same is hereby denied.

/s/ A. LEON HIGGINBOTHAM, JR.,

J.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA ex rel.
DALE H. SNYDER

v.

H. TURLEY, Warden.

MISCELLANEOUS No. 3305.

MEMORANDUM.

HIGGINBOTHAM, *J.* December 30, 1966

The relator, Dale Snyder, was arrested by the Federal Bureau of Investigation on a charge that he violated the Federal Bank Robbery Statute, 18 U. S. C. 2113. Said warrant had been issued by the United States Commissioner on the basis of a complaint sworn before him. After his arrest, Snyder was brought before the United States Commissioner for a preliminary hearing. At the hearing, the only witness to testify in behalf of the Government was Agent Noah R. Bass, Federal Bureau of Investigation. Since Agent Bass was not present when the robbery occurred, he of course had no *personal* knowledge of the occurrence and could not identify the relator through personal knowledge. However, he tesetified that a teller at the bank, a Mrs. Goss, had said that ". . . Mrs. Snyder, the wife of the defendant, had on June 2, 1966, deposited some $5 bills in her account at the Doylestown Trust Company which were part of the proceeds allegedly taken in the

bank robbery on November 19, 1965", (N. T., p. 26), and that upon Mr. Snyder's arrest on June 7, 1966, ". . . some $5 bills were on his possession that were allegedly taken from the robbery of the bank." (N. T. p. 28).

Commissioner Furia ordered the preliminary hearing continued. Unfortunately, there was no stenographer present at the preliminary hearing before the Commissioner, and because of differences in the recollection of various counsel as to what occurred at the preliminary hearing, I requested Commissioner Furia to testify in the habeas corpus hearing, and he graciously complied. Commissioner Furia summarized the hearing as follows:

> Well, what happened is that Agent Bass testified. At the conclusion of the hearing Mr. Chalfin (relator's counsel) objected to hearsay and insisted upon the presence of Miss Goss, I think her name was, the bank teller that had identified the defendant to the F. B. I. Agent. I directed Mr. Crumlish, the Assistant United States Attorney, to produce Miss Goss at a hearing scheduled for the 14th of June at 2:30 P. M. Then, of course, the United States at the hearing stated that the defendant had been indicted. I think he said presentment was being made at 1:00 P. M. that day, and of course I—and then he stated that in his opinion the indictment had already been found. I said, "Well, if that is the case, the warrant was superseded." (N. T., pp. 77, 78.)

After ordering the production of the witnesses, the Commissioner set bail in the sum of $25,000. The relator did not post bail at that time. Thirty minutes before the scheduled hearing a federal grand jury returned an indictment against the relator. The United States Attorney now contends that the return of the indictment rendered the necessity of a preliminary hearing moot. The relator contends that the action of the United States violated Rule 5

of the Federal Rules of Criminal Procedure and therefore he is entitled to the granting of the writ.[1]

The relator relies on three cases which in his opinion entitles him to the grant of the writ. They are: *Washington v. Clemmer,* 339 F. 2d 715 (D. C. Cir. 1964); *Blue v. United States,* 342 F. 2d 894 (D. C. Cir. 1964), cert. denied 85 S. Ct. 1029; and *Crump v. Anderson,* 352 F. 2d 649 (D. C. Cir. 1965). Although these cases present strong arguments for the relator's position, it is the judgment of this Court that the rationale which should be followed is that of *United States v. Heap,* 345 F. 2d 170 (2 Cir. 1965).

The thrust of the relator's arguments is that a preliminary hearing proceeding under Rule 4 of the Rules of Criminal Procedure is one which must be completed and is not rendered moot by an indictment under Rule 9. A careful reading of the cases upon which the relator relies will demonstrate that the relator's ultimate arguments should not prevail.

The decision in *Washington v. Clemmer, supra,* is not in point. In that case the Court held that the defendant was entitled to a preliminary hearing because he alleged that he could not be identified by the complaining witness. In the words of Judge Berger:

> . . . The motions Panel now decides nothing more than that, in this case and on this record the accused was entitled to have the complaining witness called as a witness on his own behalf before the Commissioner; *this is explicitly based on the defendant's sworn statement that if the complaining witness was produced she would not identify him as the attacker and he*

1. The relevant section of Rule 5(c) of the Federal Rules of Criminal Procedure reads as follows:

> ". . . If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. . . ."

would thus be released and vindicated forthwith. (339 F. 2d 715 at 724. (Emphasis added.)

When the *Washington v. Clemmer* matter was again before the Court for decision, approximately one month later, the panel particularly emphasized that

> ". . . we do not decide whether a government case composed solely of hearsay can or cannot satisfy the requirement 'competent evidence' in a preliminary hearing. We decide only that under the *circumstances shown here* the decisions and reasons for the Commissioner on the requests for the subpoena were clearly erroneous." (339 F. 2d 725, at p. 738.)

The cases are legendary which sustain the proposition that with only circumstantial evidence against him a defendant may be convicted for a crime. This is so, even where the victim cannot recognize or identify the defendant as the person who committed the crime. See *Randomsky v. United States,* 180 F. 2d 781 (9 Cir. 1950); *United States v. Gasomiser Corp.,* 7 F. R. D. 712 (D. Del. 1948). Accordingly in the instant case when before the Commissioner, there was no requirement that the Government must establish a prima facie case of probable cause only by the production of an identification witness before the Commissioner. Particularly at a Commissioner's hearing the Government has the alternative to present competent evidence to connect a defendant with the crime charged even though the testimony of the identification witness is not presented.

Blue v. United States, supra, can be distinguished on the ground that it turned on the question of the supervisory powers over the District of Columbia possessed by the Federal Courts. Judge McGowan made this point clear when he observed that:

> ". . . even if it be assumed that, on this record, the proceedings before the Commissioner were in literal

> compliance with Rule 5, our inquiry is not at end for the reason that that Rule does not exhaust the responsibilities of a Commissioner sitting in the District of Columbia." (342 F. 2d 894, at p. 896.)

In short, the Court's decision cannot be cited for the proposition that a preliminary hearing may not be superseded, but that the question is governed by special legislation passed by Congress under its supervisory powers over the District of Columbia.

Finally, the opinion in the *Heap* case decided by the Second Circuit goes to the heart of the matter:

> ". . . Heap was first taken before the United States Commissioner on February 3, 1964 and informed of his right to counsel. He was committed in lieu of $15,000 bail, and held for a preliminary hearing originally scheduled for February 6, but later adjourned to February 11. Meanwhile on February 7, a grand jury indicted heap and no hearing was ever held. *This procedure was proper, as the function of the preliminary hearing is to establish probable cause for the detention of the defendant, and indictment by the grand jury determined that issue.*" (345 F. 2d 170, at 171; emphasis added.)

The purpose of a preliminary hearing is to establish probable cause. The grand jury was established for the same purpose. That being the case, the failure of the Government to give the relator a complete preliminary hearing was not error.

By THE COURT:

/s/ A. Leon Higginbotham, Jr., *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,479

UNITED STATES OF AMERICA, EX REL.
DALE H. SNYDER,
Appellant

v.

H. TURLEY, WARDEN

Present: McLAUGHLIN, HASTIE and FREEDMAN, *Circuit Judges*

ORDER.

This appeal is dismissed as moot.

By THE COURT,

McLAUGHLIN,
Circuit Court.

Dated: March 9, 1967

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,479

UNITED STATES OF AMERICA, EX REL.
DALE H. SNYDER,
Appellant

v.

H. TURLEY, WARDEN

Present: MCLAUGHLIN, HASTIE and FREEDMAN, *Circuit Judges*

ORDER.

Appellant's motion for reconsideration of our order dismissing this appeal as moot is denied.

By THE COURT,

MCLAUGHLIN,
Circuit Court.

Dated: April 4, 1967

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 315

UNITED STATES OF AMERICA EX REL.
DALE H. SNYDER, PETITIONER

v.

H. TURLEY, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was arrested in the Eastern District of Pennsylvania on June 7, 1966, pursuant a warrant issued on a complaint charging him with bank robbery, in violation of 18 U.S.C. 2113. At a preliminary hearing on the same day before a United States Commissioner, an F.B.I. agent testified that he had been told by a teller of the robbed bank that she thought she recognized petitioner as the robber. The

agent also testified that, when petitioner was arrested (some seven months after the robbery), he had in his possession several five dollar bills which were part of the stolen money, and that petitioner's wife had deposited some of the stolen bills in her bank account a few days previously (Tr. 26-28).[1] The Commissioner directed that the identifying witness be produced at a hearing which he scheduled for 2:30 p.m. on June 14. Bail was set at $25,000, but petitioner did not post bond and was confined at the federal detention center in Philadelphia. Shortly before the continued preliminary hearing began, a grand jury indictment was returned against petitioner charging him with the bank robbery. When the Commissioner was informed of this circumstance, he immediately terminated the preliminary hearing, concluding that it no longer should be held.

On the following day, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, alleging that he was being illegally confined because of his failure to be accorded a preliminary hearing. The district judge issued a show cause order and fixed bail at $25,000. The next day (June 16) petitioner posted the required bond and was released. Thereafter a hearing on the habeas corpus application was held. The government interpreted the judge's bail order as applying to the entire period pending trial and argued that the case was moot since petitioner, even if found

[1] "Tr." refers to the transcript of proceedings at the hearing on petitioner's habeas corpus application.

entitled to the relief he requested, would remain subject to the bond until trial, pursuant to the authority of the indictment. The judge, however, stated that by his order he had meant to fix bail only pending the hearing on the petition, with the proviso that "if for any reason the petition is dismissed [he] would set bail at $25,000 on the indictment" (Tr. 7, 11). The hearing then proceeded on the merits. Subsequently, the district court held that the intervening indictment had superseded the Commissioner's warrant and had eliminated the need for a preliminary hearing (Pet. App. 2-6), and accordingly denied the habeas corpus petition (Pet. App. 1).

Petitioner appealed this denial to the Third Circuit. In oral argument the government renewed its contention that the case was moot, pointing out that under the terms of the district judge's bail order, as clarified by him at the hearing, petitioner, following the dismissal of his petition, was automatically free on bond under "the indictment." The government also filed a written motion to dismiss, urging (in addition to the fact that petitioner was out on bail) that the case was moot because the intervening indictment had "determined the issue of probable cause leaving nothing for a United States Commissioner to decide." The court of appeals, by order, dismissed the appeal as moot (Pet. App. 7).

1. It is apparent that some confusion has existed in this case because of petitioner's failure to utilize his proper remedy—mandamus. Mandamus, rather than habeas corpus, is the clearly applicable form of relief since petitioner's contention—that he was unlawfully

denied a preliminary hearing—would not, even if vindicated, entitle him to be released free of his bond, but would merely entitle him to the hearing he demands. See *Blue* v. *United States*, 342 F. 2d 894 (C.A.D.C.), certiorari denied, 380 U.S. 944; *Ross* v. *Sirica*, No. 20,535 (C.A.D.C., January 23, 1967). Whatever may have been the intention of the district judge when he originally fixed the bond, it is clear that, at the time the case reached the court of appeals, petitioner was out on bail pursuant to the indictment. He would remain out on bond under the indictment even if he showed that his original detention under the authority of the Commissioner's warrant was unlawful. Hence this case does not at all present the issue which petitioner argues (Pet. 8-11), *i.e.*, whether the restraint of bail is sufficient custody to support a habeas corpus proceeding under the reasoning of *Jones* v. *Cunningham*, 371 U.S. 236. The significant fact is that the relief petitioner seeks would in *no* way affect whatever custody he could be said to be subjected to. No contention is possible (nor does petitioner argue) that the indictment would be invalid because of petitioner's failure to receive a preliminary hearing. A grand jury need not await the outcome of a preliminary hearing before returning an indictment, nor would it be bound by a commissioner's adverse decision on the issue of probable cause. Treated strictly as a habeas corpus proceeding, therefore, the court of appeals properly dismissed the cause as moot.

2. It is somewhat unclear, however, that the court of appeals dismissed the case as moot on these narrow

grounds. It may well be that the court merely adopted that term, which the government had employed in its motion, to refer to the concept that the intervening indictment had "determined the issue of probable cause leaving nothing for a United States Commissioner to decide." [2] Such a ruling on the merits of the controversy would be justified under settled law.

The basic purpose of a preliminary hearing is to determine whether there is probable cause to believe that a person arrested committed the charged offense (see F.R.Crim.P., Rule 5(c)). The return of an indictment decides that issue and thus renders the holding of the hearing unnecessary. The federal courts of appeals which have considered this question, with the possible exception of the District of Columbia court, have unanimously so held. *E.g., United States* v. *Motte*, 251 F. Supp. 601 (S.D.N.Y.), mandamus denied, No. 30,317, June 6, 1966 (C.A. 2), certiorari denied *sub nom. Motte* v. *Ryan*, 384 U.S. 975; *United States* v. *Heap*, 345 F. 2d 170 (C.A. 2); *Vincent* v. *United States*, 337 F. 2d 891, 896 (C.A. 8), certiorari denied, 380 U.S. 988; *Byrnes* v. *United States*, 327 F. 2d 825, 834 (C.A. 9), certiorari denied, 377 U.S. 970; *United States* v. *Salliey*, 360 F. 2d 699 (C.A. 4); *United States* v. *Chase*, 372 F. 2d 453, 467 (C.A. 4). This Court recently intimated its agreement with

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[2] If the proceeding, although delineated as habeas corpus, were viewed, because of the nature of the relief sought, as an application for mandamus to compel the holding of a preliminary hearing, then the cause would not be technically moot since it would be possible to order the relief demanded.

that position in *Jaben* v. *United States*, 381 U.S. 214, 220.

Petitioner relies on two cases from the District of Columbia holding that an intervening indictment does not destroy an arrested defendant's right to a preliminary hearing for the reason that a preliminary hearing has a coordinate purpose (in addition to determining probable cause), not fulfilled by the return of an indictment, of providing a discovery mechanism whereby a defendant may learn part of the evidence against him. *Blue* v. *United States*, *supra*; *Ross* v. *Sirica*, *supra*. However, the state of the law in the District of Columbia on this issue is far from clear. In *Crump* v. *Anderson*, 352 F. 2d 649 (C.A.D.C.), decided after *Blue* but before *Ross*, a different panel reached a result opposite from that in *Blue* and *Ross*. In the *Ross* case, the government petitioned for a rehearing *en banc* which was denied *per curiam* (by a 5-4 vote). Most of the judges filed concurring or dissenting statements indicating their views. These statements showed that only the panel which decided *Ross* (which included Judge Fahy, since retired) adhered to the rationale that a preliminary hearing has a "discovery" function. Two judges concurred on the theory that requiring a preliminary hearing after an intervening indictment could sometimes be used as a "sanction" against the government, and the four dissenting judges would have followed the law of other circuits holding a preliminary hearing unnecessary once an indictment has been returned determining probable cause.

In any event, those decisions fall within the special province of the District of Columbia Court of Appeals to fashion rules for its circuit, and thus do not present a conflict requiring resolution by this Court.[3] Whatever justification there may be for using a preliminary hearing as a discovery device in connection with the type of local crimes falling within the jurisdiction of the District of Columbia, there is no reason to extend that concept to other federal jurisdictions. The preliminary hearing generally comes at too early a stage in the proceeding prior to trial to be effective as a discovery device. Moreover, the number and kind of witnesses which the government will call at the hearing depends primarily upon the discretion of the commissioner, rendering the hearing generally unsuitable for discovery purposes.[4] Thus discovery, while an occasional by-product of a preliminary hearing, is not a purpose thereof and does not furnish grounds entitling a defendant to demand such a hearing, on the chance that he may benefit therefrom, once an indictment has been returned. The amended Federal Rules of Criminal Procedure, now in effect, have made ample provision for discovery before trial. There is no reason why the preliminary hearing, which serves an entirely different function, should be used for

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[3] This point was specifically mentioned by the district judge in distinguishing and refusing to follow these C.A.D.C. cases (see Pet. App. 5-6).

[4] In this regard, see the findings of the Senate Subcommittee on Improvements in Judicial Machinery, at 113 Cong. Rec. S 1885 (daily ed., February 9, 1967).

such purpose. Prompt bringing of charges by indictment ought to be encouraged, not challenged or discouraged.[5] No further review, or exercise of this Court's supervisory powers, is here warranted.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] For this reason the prosecutor's decision to proceed by way of indictment following the initial hearing before the Commissioner was not improper, as petitioner implies (Pet. 5-6).

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